

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HAL SCHONFIELD, On Behalf of Himself and All
Others Similarly Situated,
Plaintiff(s),

v.

DENDREON CORPORATION, et al.,
Defendant(s).

NO. C07-800MJP

ORDER ON MOTIONS TO:
(1) CONSOLIDATE
(2) DESIGNATE LEAD PLAINTIFF
AND LEAD COUNSEL

KENNETH McGUIRE, LESLIE FREDERICK, et al., On
Behalf of Themselves and All Others Similarly Situated,
Plaintiff(s),

v.

DENDREON CORPORATION, et al.,
Defendant(s).

NO. C07-869MJP

HAILAN HU, Individually and On Behalf of Himself and
All Others Similarly Situated,
Plaintiff(s),

v.

DENDREON CORPORATION, et al.,
Defendant(s)

NO. C07-870MJP

JOHN McDEVITT, Individually and On Behalf of Himself
and All Others Similarly Situated,
Plaintiff(s),

v.

DENDREON CORPORATION, et al.,
Defendant(s).

NO. C07-898MJP

1 The Court has received motions to consolidate and to appoint a lead plaintiff from the
2 following individuals and groups:

- 3 1. The George Group
- 4 2. The Kahsay Group
- 5 3. Thomas Levett
- 6 4. The McGuire Group
- 7 5. The Mountanos Group
- 8 6. The Valandani Group

9 The Court has reviewed the moving papers, the responsive briefs, and all exhibits and declarations
10 attached thereto, and makes the following ruling:

11 IT IS ORDERED that the above-entitled actions will be consolidated into a single action under
12 Case No. C07-800MJP, entitled Kenneth McGuire, et al., On Behalf of Himself and All Others
13 Similarly Situated v. Dendreon Corporation, Mitchell Gold, David Urdal, Richard Hamm, Jr., Gregory
14 Shiffman, Bogdan Dziurzynski and Ruth Kunath.

15 IT IS FURTHER ORDERED that Kenneth McGuire is appointed individually as the lead
16 plaintiff and Marc M. Seltzer and Susman Godfrey, L.L.P. are appointed lead counsel in this matter.

17 **Discussion**

18 This matter comes before the Court as a series of securities class action lawsuits filed against
19 the Dendreon Corporation (a Delaware biotechnology corporation with its principal executive offices
20 in Seattle, Washington) and a variety of its corporate officers and directors. All four actions allege
21 violations of sections 10(b) and 20(a) of the Exchange Act and Rule 10(b)(5) promulgated thereunder
22 by the U.S. Securities and Exchange Commission ("SEC"), across a similar period of time (March 29,
23 2007 to May 8, 2007 in three of the lawsuits; March 1, 2007 to May 8, 2007 in the fourth). The
24 lawsuits all allege that Defendants made misleading and fraudulent statements and omissions
25

1 concerning the development of a prostrate cancer drug called Provenge, and that as a result of that
2 course of conduct, Plaintiffs were damaged by a decrease in the value of their securities.

3 Consolidation

4 All moving parties as well as the defendant corporation are in agreement that consolidation is
5 appropriate under FRCP 42(a), which provides that:

6 When actions involving a common question of law or fact are pending before the
7 court, it may order. . . all actions consolidated; and it may make such orders concerning
proceedings therein as may tend to avoid unnecessary costs or delay.

8 FRCP 42(a).

9 There are some minor differences among the operative facts alleged in the separate lawsuits,
10 but all the actions have overlapping class periods, allege the same insider sales, and allege the identical
11 date (May 8, 2007) as the date on which the alleged fraud was uncovered. Consolidation would
12 provide the benefit of cost-savings and uniformity of decision-making, while at the same time avoiding
13 the possible pitfall of *res judicata* application of earlier decision to later-decided claims. For reasons
14 of judicial economy, in light of overlapping factual and legal issues and to avoid the risk of duplicative
15 recoveries, the Court will order all the above-entitled matters to be consolidated in a single action.

16 Under the Private Securities Litigation Reform Act ("PSLRA"), Securities Exchange Act § 21
17 (codified at 15 U.S.C. § 78a *et seq*), this order of consolidation is a prerequisite to the designation of a
18 lead plaintiff and lead counsel:

19 If more than one action on behalf of a class asserting substantially the same claim
20 or claims arising under this title has been filed, and any party has sought to consolidate
21 those actions for pretrial purposes or for trial, the court shall not make the determination
[of appointment of lead plaintiff under § 21D(a)(3)B(i)] until after the decision on
the motion to consolidate has been rendered.

22 15 U.S.C. § 78U-4(a)(3)(b)(ii). "As soon as practicable" after the consolidation decision has been
23 reached, the Court is encouraged to resolve the lead plaintiff issue. Id. That analysis will be
24 undertaken below.

1 Lead plaintiff/lead counsel

2 The PSLRA requires the Court to “appoint as lead plaintiff the member or members of the
3 purported class that the court determines to be most capable of adequately representing the interests of
4 the class members[.]” 15 U.S.C. § 78U-4(a)(3)(b)(i). The language of the statute implies that groups
5 as well as individuals can act as lead plaintiff. “The McGuire Group” is comprised of Plaintiffs
6 Kenneth McGuire, David Harris, Leslie Frederick and David Wilczynski. The members of Plaintiff
7 McGuire’s group applied for lead plaintiff status “jointly and severally” (McGuire Motion, p. 2); i.e.,
8 each individual member of the group moved for appointment as lead plaintiff individually in the
9 alternative. Id., fn. 1. For reasons stated below, the Court declines to appoint the entire group as
10 lead plaintiff.

11 In this arena of litigation, courts have long been wary of artificially-constructed “plaintiff
12 groups” which assemble for no purpose other than qualifying as lead plaintiff. To that end, other
13 courts have held that proposed groups with no pre-litigation connection should submit a declaration
14 providing information about the group’s members, its structure and its intended functioning:

15 Such information should include descriptions of its members, including any pre-existing
16 relationships among them; an explanation of how it was formed and how its members
17 would function collectively; and a description of the mechanism that its members
18 and the proposed lead counsel have established to communicate with one another about
19 the litigation. If the proposed group fails to explain and justify its composition and structure
20 to the court's satisfaction, its motion should be denied or modified as the court sees fit.

21 In re Networks Assocs., Inc., Sec. Litig., 76 F.Supp.2d 1017, 1026 (N.D. Cal. 1999). While this
22 approach has not been universally adopted (see In re Versata, Inc., Sec. Litig., 2001 WL 34012374
23 (N.D. Cal.)), this Court finds it useful when confronted with a plethora of groups, none of which (with
24 the exception of a father and son in the Mountanos Group) seem to have any pre-existing relationship.
25 Therefore, while Plaintiff McGuire is found qualified as lead plaintiff, the McGuire Group (which filed
26 no accompanying declarations explaining how they were formed or would function collectively) is not.

1 “[C]ourts in [the Ninth] Circuit routinely break apart a proposed group in search of the most
 2 adequate plaintiff.” In re Surebeam Corp., 2004 WL 5159061, *7 (S.D. Cal.) (*citations omitted*). The
 3 PSLRA provides the guidelines which create a rebuttable presumption of qualification for that
 4 position; the statute describes as “most qualified” the plaintiff who has:

- 5 1. Brought the motion for appointment of lead counsel in response to the publication of
 6 notice;
- 7 2. “[T]he largest financial interest in the relief sought by the class; and
- 8 3. Otherwise satisfies the requirements of FRCP 23.

9 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(aa)-(cc).

10 There is a three-step inquiry in the Ninth Circuit for the determination of lead plaintiff status.
 11 As described in In re Cavanaugh (306 F.3d 726, 729 (9th Cir. 2002)), the district court must
 12 determine:

13 1. Whether the procedural requirements of the PSLRA have been met

14 A plaintiff meets the procedural requirements of the PSLRA if the first-filed plaintiff has filed
 15 an appropriate notice to the class within 20 days of the filing of the action and the prospective lead
 16 plaintiff has moved for lead plaintiff status within 60 days of such notice. 15 U.S.C. § 78u-
 17 4(a)(3)(A)(i). In this matter, counsel in the first-filed action caused the first notice to be published on
 18 May 25, 2007. McGuire Mtn, Decl. of Seltzer, Ex. C. Counsel for McGuire filed a separate
 19 complaint on June 6, 2007 and filed a motion requesting lead plaintiff/lead counsel status prior to the
 20 expiration of the 60-day period from the publication of the notice of the first-filed action.

21 Additionally, Plaintiff McGuire has filed the required sworn certification detailing “all of the
 22 transactions of the plaintiff that is the security that is the subject of the complaint during the class
 23 period specified in the complaint.” Id., Ex. A; 15 U.S.C. § 78u-4(a)(2)(A)(iv). Plaintiff McGuire has
 24 met the procedural requirements of the PSLRA.
 25

1 2. Which plaintiff has the largest financial interest in the action and whether that plaintiff meets the
2 requirements of FRCP 23

3 Although the PSLRA does not specify the criteria for calculating which party has the largest
4 financial interest, the factors which courts have generally considered are: the number of shares
5 purchased during the class period, the number of net shares purchased during the class period, the total
6 net funds expended during the class period and the estimated losses suffered during the class period.
7 In re Surebeam, 2004 WL 5159061 (S.D. Cal.); see also In re Olsten Corp. Sec. Litig., 3 F.Supp.2d
8 286, 295 (E.D.N.Y. 1988); In re Enron Corp. Sec. Litig., 306 F.R.D. 427, 440 (S.D.Tex. 2002).
9

10 Plaintiff McGuire has presented evidence establishing that he has purchased the largest amount
11 of shares (650,00), the largest amount of net shares (575,350), expended the largest amount of funds
12 (\$9,339,592.03) and suffered the largest estimated loss (\$5,766,714.25 FIFO; \$5,151,044.03 LIFO)
13 during the class period. McGuire Mtn., p. 10; Decl. of Seltzer, Ex. B. The Court finds that Plaintiff
14 McGuire has the largest financial interest in the litigation.

15 Additionally, the PSLRA provides that the proposed lead plaintiff must satisfy the requirements
16 of FRCP 23. In re Cavanaugh holds that this inquiry shall focus solely on the “typicality” and
17 “adequacy” aspects of that rule (as the other elements of Rule 23 go to the issue of the certification of
18 the class as a whole.) 306. F.3d at 730, n. 5 and 732.
19

20 “Typicality” in the class action context is measured by whether the applicant’s claims arise
21 from the same event or course of conduct which gave rise to the claims of the class members, and are
22 founded on the same legal theory. Plaintiff McGuire:

- 1 1. Purchased his Dendreon securities during the class period,
- 2 2. Paid stock prices which he alleges to have been artificially inflated by either misleading
- 3 statements of Defendants or by Defendants' failure to make material disclosures, and
- 4
- 5 3. Alleges that he was damaged thereby.

6 His alleged injuries stem from the same course of conduct complained of by the other plaintiffs and his
7 causes of action are founded on similar legal theories (the fact that Plaintiff McGuire alleges an
8 additional ground for liability – failure to disclose an FDA inspection of manufacturing facilities and
9 resulting warning to Defendants (McGuire Complaint, ¶ 81 – does not alter the typicality of the
10 remainder of his claims). The Court finds that the FRCP 23(a)(3) typicality requirements have been
11 met.

12 In order to satisfy the FRCP 23 conditions of “adequacy,” it must be demonstrated that: (1) the
13 proposed lead plaintiff’s interests are in common with, and not antagonistic to, those of the class; and
14 (2) proposed lead plaintiff’s counsel are qualified, experienced and generally able to conduct the
15 litigation. Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978). The Court finds
16 that Plaintiff McGuire’s interests in prosecuting this litigation are identical to those of the remainder of
17 the class; namely, recovering for Defendants’ allegedly fraudulent and misleading statements and
18 omissions concerning the status of the development and manufacture of Provenge. As discussed
19 below, Plaintiff McGuire’s counsel – Marc M. Seltzer and Susman Godfrey, L.L.P. – are found to be
20 experienced and qualified in prosecuting securities class action litigation. The Court finds that the
21 “adequacy” requirements of FRCP 23 have been met by Plaintiff McGuire.
22

1 3. Whether other candidates can rebut the presumption that the putative lead plaintiff can adequately
2 represent the class

3 The only serious challenge to Plaintiff McGuire's qualifications is presented by the Mountanos
4 Group, which questions this proposed lead plaintiff's typicality and adequacy based on series of facts
5 which are alleged to render Plaintiff McGuire vulnerable to a defense of insider trading (and thus
6 subject to unique defenses to which the remainder of the class is immune). The facts concern Plaintiff
7 McGuire's background in biotechnology investment and his connections to other biotech companies
8 and individuals who have served on the boards of Dendreon and other unrelated biotechnology
9 enterprises. Mountanos Group Opp., pp. 6-8.

11 These facts are intended to create an inference of conflict of interest and insider trading on
12 Plaintiff McGuire's part; i.e., because he has been both an investor in and former director of other
13 (unrelated) biotech companies, he might possibly have invested in Dendreon based on material non-
14 public information. What is absent from the Mountanos allegations, however, is any evidentiary basis
15 for concluding that Plaintiff McGuire actually did rely on insider information in acquiring the securities
16 at issue in this litigation. The fact that he has professional and investment experience in the
17 biotechnology industry is insufficient to raise serious questions about Plaintiff McGuire's typicality or
18 adequacy. See Beale v. EdgeMark Financial Corp., 164 F.R.D. 649, 656 (N.D.Ill. 1995).
19 ("Speculation regarding access to non-public information, in the absence of any allegations or evidence
20 of such information, does not impact on the issue of reliance.") Additionally, Plaintiff McGuire has
21 filed an extensive declaration rebutting the inferences suggested by the Mountanos Group's
22 aggregation of facts. McGuire Group Reply, Decl. of McGuire.

24 The Court is satisfied that Plaintiff McGuire meets all the conditions for "most adequate
25 plaintiff" in this consolidated class action lawsuit.

1 Lead counsel

2 The PSLRA recognizes the authority of the lead plaintiff to select and retain lead counsel,
3 subject to the approval of the court. 15 U.S.C. § 78u-4(a)(3)(B)(v). By statute, that approval should
4 not be withhold unless necessary “to protect the interests of the class.” 15 U.S.C. § 78u-
5 4(a)(3)(B)(iii)(II)(aa). A court should approve the lead plaintiff’s choice of lead counsel “based solely
6 on that counsel’s competence, experience and resources...” In re MicroStrategy Inc. Sec. Litig., 110
7 F.Upp.2d 427, 438 (E.D.Va. 2000).
8

9 Plaintiff McGuire has selected and retained Marc M. Seltzer and the law firm of Susman
10 Godfrey, L.L.P. The Court is satisfied, based on the materials submitted, that proposed lead counsel
11 possess the requisite experience in the area of securities litigation and the resources to adequately
12 discharge their responsibilities in this role. See Resumes of Susman Godfrey L.L.P. and Marc M.
13 Seltzer, Decl. of Seltzer, Exs. D and E. Furthermore, no challenges have been made to Plaintiff
14 McGuire’s selection of lead counsel and therefore the Court finds no reason to disturb the choice of
15 these counsel to serve in that capacity.
16

17 **Conclusion**

18 The four above-titled securities class action lawsuits will be consolidated as a single action,
19 henceforth known as Kenneth McGuire, et al., v. Dendreon Corporation, et al., Case No. C07-
20 800MJP. The Court is not satisfied that the McGuire Group has met the requirements to qualify as a
21 lead plaintiff group in this action, but finds that Plaintiff Kenneth McGuire individually meets the
22 qualifications for lead plaintiff as set out in the PSLRA, and so appoints Plaintiff McGuire as the lead
23 plaintiff. The Court further approves the lead plaintiff’s selection of Marc M. Seltzer and Susman
24 Godfrey, L.L.P. as lead counsel in this matter.
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1 The clerk is directed to provide copies of this order to all counsel of record.

2 Dated: October 4, 2007

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6 Marsha J. Pechman
7 U.S. District Judge
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